No. 91-1521

In The

Supreme Court of the United States

October Term, 1992

UNITED STATES,

PETITIONER,

v.

LOWELL GREEN,

RESPONDENT.

On Writ Of Certiorari To The District Of Columbia Court Of Appeals

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether the "bright-line" rule established by *Edwards v. Arizona*, 451 U.S. 477 (1981), *Arizona v. Roberson*, 486 U.S. 675 (1988) and *Minnick v. Mississippi*, 111 S.Ct 586 (1990) should be changed to permit law enforcement officers to initiate interrogation of a suspect who has invoked his right to counsel five months previously in connection with an unrelated offense, where the suspect consulted with counsel and pleaded guilty to the unrelated offense prior to the interrogation.

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OPINION BELOW

The opinion of the District of Columbia Court of Appeals (Res. App. A, 1a-18a) is reported at 592 A. 2d 985.

JURISDICTION

The judgment to the court of appeals was entered on May 31, 1991. A petition for rehearing was denied on November 25, 1991. Pet. App. 34a-35a. On February 11, 1992, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including March 24, 1992. The petition was filed on March 20, 1992, and was granted on May 18, 1992. The jurisdiction of this Court rests on 28 U.S.C. 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution provides, in part: "No person • • • shall be compelled in any criminal case to be a witness against himself."

STATEMENT OF CASE

On July 18, 1989, officers of the District of Columbia Metropolitan Police Department arrested respondent Lowell Green on drug charges. The officers gave respondent a printed advice-of-rights form known as a "PD 47." In response to the printed question whether he was willing to talk to the police without having an attorney

present, respondent wrote "no." The officers did not attempt to question him. Res. App. 2a.

Respondent appeared in court the following day, and an attorney was appointed to represent him. On July 28, 1989, the drug charges were dismissed at the preliminary hearing. Respondent remained in custody because of an unrelated juvenile matter. Res. App. 2a.

In August 1989, respondent was indicted on charges of possessing a controlled substance with intent to distribute it arising out of respondent's July 18, 1989, arrest. On September 27, 1989, he entered a plea of guilty to the lesser included offense of attempted possession of a controlled substance with intent to distribute it. Res. App. 2a.

Respondent remained in custody awaiting sentencing on the drug charge.[1] On January 4, 1990, a Metropolitan Police Department detective obtained an arrest warrant charging respondent with the unrelated 1988 murder of Cheaver Herriott. Also on January 4, 1990, an order was obtained by the United States Attorney's Office requiring the United States Marshal to release the respondent from custody to an Officer of the Metropolitan Police Department for the purpose of booking, fingerprinting, photographing and processing the respondent on the murder charge and at the conclusion of that processing to return

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[1] Respondent was held in the Youth Center at Lorton Reformatory while a study was performed to determine his suitability for treatment under the District of Columbia Youth Rehabilitation Amendment Act of 1985. Res. App. 2a; see D.C. Code Ann. §24-803(e) (1989). On February 26, 1990, respondent was sentenced to 15 months' incarceration under the Youth Rehabilitation Act. Res. App. 2a.

the respondent "forthwith" to the custody of the United States Marshal.

At the motions hearing the respondent testified that at around 4:00 a.m. on January 5, 1990, the respondent was taken from his sleep and transported to the Superior Court of the District of Columbia arriving there at approximately 6:00 a.m. Res. App. C 56. Respondent was held in the courthouse until 10:17 a.m. at which time two police officers took him into their custody. According to the respondent he was then placed in a paddy wagon where he waited approximately 10 minutes and was then transported to 300 Indiana Avenue, Washington, D.C. Respondent waited in the paddy wagon at 300 Indiana Avenue for approximately 30 minutes and was then transported back to the Superior Courthouse. Respondent waited in the paddy wagon at the Superior Courthouse for approximately 30 minutes and was then transported again to 300 Indiana Avenue where he waited an additional 30 minutes and was then taken to the Homicide Branch of the Metropolitan Police. Res. App. C 58-60.

At the motions hearing the respondent also testified that upon entering the Homicide Branch he asked the police officer for his attorney. Res. App. C 60. No lawyer was provided. The police officer directed the respondent to "sign this," referring to a PD 47 rights card. Res. App. C 61-62. The detective told him, "You can make this hard on yourself or make it easy. We got you for Kevin Henson too, you are a suspect in that case. If you don't tell us something about Jamaican Tony, you are going to get charged for both of these cases." Res. App. C, p. 62. The respondent was afraid. He agreed to waive his rights and make a statement.

Respondent was indicted for murder. He moved to suppress his confession, claiming that it was involuntary and that it had been obtained in violation of *Edwards v. Arizona*, 451 U.S. 477 (1981).

The trial court initially denied respondent's motion. Res. App. B 19a-30a. The court first rejected respondent's contention that his confession was involuntary. After hearing testimony from Detective Donald Gossage of the Metropolitan Police Department concerning the circumstances surrounding respondent's waiver of his *Miranda* rights, the trial court found that "as between those two accounts, that is the account given by [respondent] and Detective Gossage, the Court credits Detective Gossage's account." Res. App. B 20a. The trial court stated:

> Having make this credibility finding which leads the Court to conclude that [respondent] was brought to the Homicide Office of the police department, was given his Miranda Rights in the way in which Detective Gossage testified they were given on the stand, that [respondent] understood his rights and that he appreciated them and thereafter waived them, the Court finds no basis to suppress any of these statements on the ground that they were given in violation of Miranda or were involuntarily made.

Id. at 21a-22a.

With respect to respondent's *Edwards* claim, the court noted that an "extraordinary amount of time" had elapsed between respondent's invocation of his right to counsel and his confession, and that respondent had had an opportunity to consult with counsel during that time.

Res. App. B 25a. Under those circumstances, the court concluded that "none of the reasons which underlie the [Supreme] Court's decision[s] which have addressed a criminal defendant's right to [counsel] under the [Sixth] Amendment and his right not to incriminate himself under [Fifth] Amendment, would be served by suppression of these statements." *Id.* at 26a.

Five days after the trial court's ruling, this Court decided *Minnick v. Mississippi*, 111 S.Ct. 486 (1990). In light of that decision, the trial court reconsidered its ruling on respondent's *Edwards* claim and ordered that respondent's confession be suppressed. The trial court stated:

> The Court is of the view that with the latest pronouncement from the Supreme Court, the highest Court of this land, given its interpretation of the decisions which preceded the case of *Arizona vs. Edwards*, (sic) that the decision requires suppression of the statement; that the Supreme Court has set up, as mandated, a brigiit, quote, unquote, bright line test, and that is one of the problems, in my view of bright line tests. They kind of do not permit for the type of individual consideration of the facts * * * .
>
> The record is clear as to what the Court has found to be the case here. And I suppose what is required is that whenever a person is in custody, the police must check to see whether counsel has been appointed, and then before questioning that person, confer with counsel.
>
> I believe that the Minnick Case requires this result, and so the Court reverses its ruling made on Friday and grants the motion, the defense motion to suppress the – all of the statements

> which were under consideration, both the oral statements to Detective Gossage, as well as the videotape memorialization of it. That's the Court's decision.

Res. App. B 31a-32a.

The District of Columbia Court of Appeals affirmed. Res. App. A 1a-18a. They "conclude[d] that the Supreme Court's teachings in this area so far do not countenance a departure from the "bright-line" rule of *Edwards* in the present circumstances." Res. App. A 2a. In explaining its conclusion the court stated that:

> "Preserving the integrity of an accused's choice to communicate with police only though counsel is the essence of *Edwards* and its progeny." *Patterson v. Illinois*, 487 U.S. 285, 291, 108 S.Ct. 2389, 2394, 101 L.Ed.2d 261 (1988). The Court has further explained that "[t]he merit of the *Edwards* decision lies in the clarity of its command and the certainty of its application," *Minnick*, 111 S.Ct. at 490; "the *Edwards* rule provides 'clear and unequivocal' guidelines to the law enforcement profession," *id* (citation and additional quotation marks omitted), and it "conserves judicial resources which would otherwise be expended in making difficult determinations of voluntariness." *Id.* at 489.

Res. App. A 5a-6a..

In reaching this conclusion the Court acknowledged that the respondent's case differed from *Edwards* and other cases decided by this Court in several ways.

First, that the "police reinitiated questioning only after the defendant had been furnished counsel and consulted with him in the drug case, and that the renewed questioning concerned a crime entirely unrelated to the one regarding which the defendant had refused to talk without counsel." Res. App. A 6a-7a. The court noted, however, that the second factor was present in *Minnick*, and the first factor was present in *Arizona v. Roberson*, 486 U.S. 675 (1988). The court rejected the government's reliance on those factors. In the court's view, to admit the challenged evidence in this case would require that *Minnick* and *Roberson* be "narrow[ed] * * * to their individual settings." Res. App. A 7a. The court went on to state that:

> * * * if *Edwards*, *Roberson*, and *Minnick* together teach anything, it is the need for great caution in finding distinctions among cases all involving the paradigmatic original request by the accused for counsel, reflecting "his own view that he is not competent to deal with the authorities without legal advice," *Roberson*, 486 U.S. at 681, 108 S.Ct. at 2098 (citation omitted). The Supreme Court having made clear that police-initiated questioning about a separate offense and questioning after opportunity to consult counsel each fails to justify departure from *Edwards'* "bright-line, prophylactic * * * rule," *id.* at 682, 108 S.Ct. at 2098, we are not convinced that in combination the Court would regard these two factors differently.

Res. App. A 8a.

Second, the court recognized that this case differs from the *Edwards* line of cases because there was a five-month interval between respondent's invocation of the

Edwards right to counsel and the subsequent interrogation. Res. App. A 8a-12a. The court stated that "[t]here is no question" that the danger of police badgering that the *Edwards* rule is designed to prevent "is reduced when the police have made no effort to interrogate the defendant for more than five months after his assertion of rights." *Id.* at 8a-9a. Although the court viewed this argument as "substantial" it stated that "there are weighty considerations on the other side of the ledger as well." Res. App. 9a. In explaining the court noted:

> In *Minnick*, although the relevant interval was only a matter of days, the Court emphasized "the coercive pressures that accompany custody and that may *increase* as custody is prolonged." 111 S.Ct. at 491 (emphasis added). Moreover, except for his ongoing contacts with his custodial caretakers, we must assume that [respondents]'s only contact with law enforcement officials (investigators and prosecutors) during this period was through, or in the presence of, his attorney. Hence there is nothing in the lapse of time itself from which to deduce that his original belief in his vulnerability to the pressures of custodial interrogation had diminished as he progressed through the steps of pleading guilty to the (lesser included) offense of attempted drug distribution; it is just as likely that his sense of dependence on, and trust in, counsel as the guardian of his interests in dealing with government officials intensified.
>
> Furthermore, with the government's argument based upon lapse of time we are again met with the Supreme Court's insistence that the *Edwards* rule be kept "clear and unequivocal."

Res. App. A 9a-10a. Footnote omitted.

Third, the court recognized that before the interrogation, respondent pleaded guilty to the offense with which he was charged when he invoked the *Edwards* right. Res. App. A 12a-14a. The court noted that this "might seem to be [the government's] most potent argument . . . one that promises adherence to the requirement of some form of bright-line rule." Res. App. A 12a. However, the court identified the actual issue as "whether by pleading guilty in the drug case defendant can be said to have 'reopened the dialogue with the authorities' within the meaning of *Edwards*, 451 U.S. at 486 n. 9, 101 S.Ct. at 1885, n. 9 so as to validate his waiver of rights and interrogation on the murder charge." Res. App. B 13a. The court concluded that the:

> [Respondent] pled guilty with the advice and assistance of counsel. Hence while the knowing and voluntary plea presumable demonstrated that acceptance of personal responsibility and not the pressures of custody caused him to incriminate himself, it also was consistent with his original election to deal with government officials only through an attorney. Indeed, from [respondent]'s viewpoint the fact that counsel had negotiated a plea to a lesser charge sparing him a mandatory-minimum sentence, D.C. Code §33-541(c)(1)(A) (1990 Supp.), would only have confirmed the wisdom of his choice to insist on the shield of legal representation. If [respondent] had other criminal involvement to conceal, or if he merely feared that he would be wrongly implicated in crimes committed by someone else, in either case we must assume he chose the shelter afforded by *Miranda* and *Edwards* to insure that the coercive pressures of

> custody did not cause him to incriminate himself. [Respondent]'s plea of guilty in the drug case, because it is consistent with his election to communicate with the police only through counsel, cannot be the pivotal break in events that *Edwards* demands before a waiver can be regarded as an initial election by the accused to deal with the authorities on his own.

Id. at 13a-14a.

SUMMARY OF ARGUMENT

Miranda v. Arizona, Edwards v. Arizona, Arizona v. Roberson, and *Minnick v. Mississippi* established a series of prophylactic rules designed to protect the Fifth Amendment privilege against compelled self-incrimination in the context of custodial interrogation. The Court has justified the creation of each of those rules on the ground that it protects the suspect against the inherently coercive pressures of interrogation in a police-dominated setting. This case presents three facts not explicitly addressed by the Court in *Miranda, Edwards, Roberson,* or *Minnick*. The petitioner seeks to dim or eliminate the "bright-line rule" established in *Miranda, Edwards, Roberson,* and *Minnick* because of these differences. Because the differences in these cases are insignificant, or have been already addressed by the Court the "bright-line rule" should not be changed.

First, the respondent entered a plea of guilty to the charge that prompted his invocation of the *Edwards* right to counsel before the police initiated interrogation. The respondent's waiver of his Fifth Amendment privilege

was done in the presence of and with the assistance of counsel. In pleading guilty to one offense the respondent did not waive his right to counsel to other offenses which he may have committed. The waiver to the Fifth Amendment in the context of a guilty plea cannot be construed as a waiver of his original advice to the authorities that he is not capable of dealing with the authorities without the assistance of counsel. The guilty plea therefore does not reopen the dialogue with the police.

Second, more than five months elapsed between respondent's assertion of the *Edwards* right to counsel and the initiation of interrogation by the police. The five month period of incarceration increased the pressures on the respondent making him more vulnerable to the coercion that can accompany custodial interrogation. An additional problem associated with incarceration is the tendency of the inmate to become institutionalized to the point where he responds affirmatively to all instructions of the authorities. Finally, any change in the "bright-line rule" that would make it dependent on the length of time between the request for counsel and the reinitiation of questioning would dim or eliminate the "bright-line rule."

Third, although this case differs minutely from *Arizona v. Roberson* and *Minnick v. Mississippi,* the difference(s) have already been addressed in those cases when those two cases are read together and nothing in this case should cause a change in the "bright-line rule." This case presents a situation where the defendant invokes his *Edwards* right, speaks with counsel and later is approached about a crime unrelated to the crime in which he asserted his *Edwards* right. In *Arizona v. Roberson,* the

suspect requested counsel and was reinterrogated before he had the opportunity to speak with counsel. In *Minnick v. Mississippi,* the suspect asserted his *Edwards* right was permitted to speak with counsel and was later interrogated about a different offense. When read together *Roberson* and *Minnick* address the set of circumstances of this case. Nothing in these two factual differences are sufficient to distinguish them from *Roberson* and *Minnick* and therefore cause a change in this Court's "bright-line rule."

ARGUMENT

THE "BRIGHT-LINE RULE" ESTABLISHED BY *EDWARDS V. ARIZONA,* SHOULD NOT BE CHANGED TO PERMIT LAW ENFORCEMENT OFFICERS TO INITIATE INTERROGATION OF A SUSPECT WHO HAS INVOKED HIS RIGHT TO COUNSEL FIVE MONTHS PREVIOUSLY IN CONNECTION WITH AN UNRELATED OFFENSE, WHERE THE SUSPECT CONSULTED WITH COUNSEL AND PLEADED GUILTY TO THE UNRELATED OFFENSE PRIOR TO THE INTERROGATION

In *Miranda v. Arizona,* 384 U.S. 436 (1966), the Court held that, prior to interrogation of a defendant who is in custody "or otherwise deprived of his freedom of action in any significant way," *id.* at 444 the police must warn him (1) that he has a right to remain silent; (2) that any statement he makes may be used as evidence against him; (3) that he is entitled "to consult with a lawyer and to have a lawyer with him during interrogation," *id.* at 471; (4) that an attorney will be appointed to represent him if

he cannot afford to retain one; and (5) that he may exercise any of these rights at any point during the interrogation. The Court went on to say that once an individual in custody invokes his right to counsel, interrogation "must cease until an attorney is present" at that point "the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning." *Id.* at 474.

Edwards v. Arizona, 451 U.S. 477 (1981) gave force to the holding in *Miranda* finding it "inconsistent with *Miranda* and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel." 451 U.S., at 485. In *Edwards,* the defendant invoked his right to counsel under *Miranda* after his arrest on state criminal charges. *Id.* at 478-479. The defendant was kept in custody and was not provided with counsel; the next day the police returned and attempted to interrogate him, despite his statement that he did not wish to speak with the police. *Id.* at 479. The defendant ultimately made an incriminating statement regarding his involvement in the offenses for which he had been arrested. The Court stated that "when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." *Id.* at 484. Further this Court held that an accused who requests an attorney, "having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been

made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Id.* at 484-485.

Edwards is "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights." *Michigan v. Harvey*, 494 U.S. ___, ___, 110 S.Ct. 1176 (1990). *See also, Smith v. Illinois*, 469 U.S. 91, 98 (1984).

Following the prophylactic rule announced in *Edwards* this Court has decided two cases expanding the scope of the rule. The first of these cases is *Arizona v. Roberson*, 486 U.S. 675 (1988). In *Roberson* the defendant invoked his right to counsel after his arrest on a burglary charge. The defendant remained in custody and was not provided with an attorney; three days later, after again advising him of his *Miranda* rights, the police interrogated him about a different burglary. The *Roberson* Court stated:

> The *Edwards* corollary that if a suspect believes that he is not capable of undergoing such questioning without advice of counsel, then it is presumed that any subsequent waiver that has come at the authorities' behest, and not at the suspect's own instigation, is itself the product of the "inherently compelling pressures" and not the purely voluntary choice of the suspect. As Justice WHITE has explained, "the accused having expressed his own view that he is not competent to deal with the authorities without legal advice, a later decision at the authorities' insistence to make a statement without counsel's

> presence may properly be viewed with skepticism." *Michigan v. Mosley*, 423 U.S. 96, 110, n. 2, 96 S.Ct. 321, 829, n.2 (concurring in result).

Id. at 681-682

The *Miranda* and *Edwards* decisions have created a "bright-line rule" and this Court has "repeatedly emphasized the virtues of a bright-line rule in cases following Edwards as well as Miranda." *Arizona v. Roberson*, 108 S.Ct. 2098, and that the Court "like[s] them to be 'clear and unequivocal,'" *McNeil v. Wisconsin*, 111 S.Ct. 2204 (1991). *See also Michigan v. Jackson*, 475 U.S. 625, 634 (1986); *Smith v. Illinois*, 469 U.S. 91, 98 (1984) (*per curiam*); *Solem v. Stumes*, 465 U.S. 638, 646 (1984); see also *Shea v. Louisiana*, 470 U.S. 51 (1985); *Oregon v. Bradshaw*, 462 U.S. 1039, 1044 (1983) (plurality opinion) (Rehnquist, J.). In *Fare v. Michael C.*, 442 U.S. 707 (1979) Court explained:

> • • • relatively rigid requirement that interrogation must cease upon the accused's request for an attorney • • • has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible. This gain in specificity, which benefits the accused and the State alike, has been thought to outweigh the burdens that the decision in *Miranda* imposes on law enforcement agencies and the courts by requiring the suppression of trustworthy and highly probative evidence even though the confession might be voluntary under traditional Fifth Amendment analysis.

Id. at 718.

In *Roberson* the Court stated:

> • • • The *Edwards* rule thus serves the purpose of providing "clear and unequivocal" guidelines to the law enforcement profession. Surely there is nothing ambiguous about the requirement that after a person in custody has expressed his desire to deal with the police only through counsel, he "is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police."

Id. 486 U.S. 682.

The necessity of the bright-line rule in *Edwards* and the *per se* aspect of *Miranda* was explained by the Court in *Roberson* citing *Fare v. Michael C.*, 442 U.S. 707 (1979):

> The rule in *Miranda* . . . was based on this Court's perception that the lawyer occupies a critical position in our legal system because of his unique ability to protect the Fifth Amendment rights of a client undergoing custodial interrogation. Because of this special ability of the lawyer to help the client preserve his Fifth Amendment rights once the client becomes enmeshed in the adversary process, the Court found that 'the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system' established by the Court. [384 U.S.], at 469 [86 S.Ct., at 1625]. Moreover, the lawyer's presence helps guard against overreaching by the police and ensures that any statements actually obtained are accurately transcribed for presentation into evidence. *Id.*, at 470 [86 S.Ct., at 1625-1626].

> "The *per se* aspect of *Miranda* was thus based on the unique role the lawyer plays in the adversary system of criminal justice in this country." 442 U.S. at 719, 99 S.Ct., at 2568-2569.

Id. 486 U.S. 682 n. 4.

The second of the cases to expand the scope of *Edwards* was *Minnick v. Mississippi*, 111 S.Ct. 486 (1990). Where *Roberson* considered the unfulfilled request for counsel *Minnick* addressed the issue of the Fifth Amendment where the defendant had been afforded the opportunity to speak with counsel. In *Minnick*, the defendant invoked his right to counsel after he was arrested on a murder warrant. The defendant then had an opportunity to consult with an attorney although he remained in custody. Three days later, the police interviewed the defendant again about the murder where he eventually gave an incriminating statement. The Court suppressed the statements holding that "• • • the Fifth Amendment protection of *Edwards* is not terminated or suspended by consultation with counsel." *Id.* at 489 and that "In context, the requirement that counsel be 'made available' to the accused refers to more than an opportunity to consult with an attorney outside the interrogation room." *Id.* at 490. The Court emphasized that "counsel's *presence* at interrogation is not unique to *Edwards*. It derives from *Miranda*, where we said that in the cases before us "[t]he presence of counsel • • • would be the adequate protective device necessary to make the process of police interrogation conform to the dictates of the [Fifth Amendment] privilege. His presence would insure that statements made in the government-established atmosphere are not the product of compulsion" *Id.* at 490. *See also Fare v.*

Michael C. supra 442 U.S., at 719. *See also Oregon v. Bradshaw, supra* where the Court described the holding of *Edwards* to be "that subsequent incriminating statements made without [*Edwards*] attorney present violated the rights secured to the defendant by the Fifth and Fourteenth Amendments to the United States Constitution." *Id.* 462 U.S. 1039, 1043. *See also Shea v. Louisiana,* 470 U.S. 51, 52 (1985); *Patterson v. Illinois,* 487 U.S. 285 (1988).

Over fifty years ago in *Johnson v. Zerbst,* 304 U.S. 458 (1938) the Court stated that you should "indulge every reasonable presumption against waiver of fundamental constitutional rights." *Id.*, at 464. In *Michigan v. Jackson* 475 U.S. 625 the Court said that "Doubts must be resolved in favor of protecting the constitutional claim. This settled approach to questions of waiver requires us to give a broad, rather than a narrow, interpretation to a defendant's request for counsel." *Id.*, at 475 U.S. 633. In addressing the waiver issue the Court in *Edwards v. Arizona, supra,* stated:

> It is reasonably clear under our cases that waivers of counsel must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends in each case "upon the particula facts and circumstances surrounding that case, including the background, experience and conduct of the accused.

Id., at 451 U.S. 482. See also *Faretta v. California,* 422 U.S. 806 (1975); *North Carolina v. Butler,* 441 U.S. 359, 374-375 (1979); *Brewer v. Williams,* 430 U.S. 387, 405 (1977); *Fare v.*

Michael C., 442 U.S. 707, 724-725 (1979). Indeed, the ultimate holding in *Edwards* was "that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." 451 U.S. 484.

1. The *Edwards* rule, like other applications of *Miranda* "is not itself required by the Fifth Amendment's prohibition on coerced confessions, but is instead justified only by reference to its prophylactic purpose* * *" *Connecticut v. Barrett,* 479 U.S. 523, 528 (1987). The Court has repeatedly stated that the justification for the prophylactic rules established in *Edwards* and the cases following it is the need to "prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights." *McNeil v. Wisconsin,* 111 S.Ct. 2204, 2208 (1991) (quoting *Michigan v. Harvey,* 494 U.S. 344, 350 (1990)); see *Minnick v. Mississippi,* 111 S.Ct. at 489; *Smith v. Illinois,* 469 U.S. 91, 98 (1984); *Oregon v. Bradshaw,* 462 U.S. 1039, 1044 (1983). The concern underlying the *Edwards* rule is that "[i]n the absence of such a bright-line prohibition, the authorities through 'badger[ing]' or 'overreaching' – explicit or subtle, deliberate or unintentional – might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance." *Smith v. Illinois,* 469 U.S. 91, 98.[2]

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[2] The *Miranda* Court reviewed the techniques of persuasion and the psychological ploys listed, and specifically encouraged, in police policy manuals to increase the number of confessions. *Miranda v. Arizona,* 384 U.S. at 449-54. The Court concluded that

Relying on three separate factors "Taken singly or in conjunction" Pet. Brief 14. The petitioner seeks to dim or eliminate the "bright-line rule" of *Edwards*.

a. First, the petitioner argues, this case differs from the Court's previous *Edwards* cases because the respondent, after he requested counsel in the drug case but before he was interrogated about the murder, entered a plea of guilty to the drug charge that had prompted his invocation of the *Edwards* right to counsel.

A guilty plea "represents a break in the chain of events which has preceded it in the criminal process," *Tollett v. Henderson*, 411 U.S. 258, 267 (1973) and constitutes a waiver of the Fifth Amendment right not to be compelled to incriminate oneself. *Boykin v. Alabama*, 395 U.S. 238, 243 (1969); *McCarthy v. United States*, 394 U.S. 459, 466 (1969). *Edwards* itself does not make its prophylactic ban permanent. The accused can lift it by reinitiating conversation with the police about the crime. It is also true that the *Edwards'* presumption of involuntary waiver fades when the accused is released from custody.

"the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of the individuals." *Id.* at 455 (footnote omitted). See also *Illinois v. Perkins*, 110 S.Ct. 239 (1990) (confirming the necessity of *Miranda's* protections during custodial interrogation); *Rhode Island v. Innis*, 446 U.S. 291, 299 (1980) (construing broadly "techniques of [p]ersuasion" as "interrogation" because "[t]he concern of the Court in *Miranda* was that the 'interrogation environment' created by the interplay of interrogation and custody would 'subjugate the individual to the will of his examiner' and thereby undermine the privilege against compulsory self-incrimination").

E.g. Dunkins v. Thigpen, 854 F.2d 394, 397 (11th Cir. 1988) *cert. denied* 489 U.S. 1059 (1989); *United States v. Skinner*, 667 F.2d 1306, 1309 (9th Cir. 1982), *cert. denied* 463 U.S. 1229 (1983); *People v. Trujillo*, 773 P.2d 1086, 1091-92 (Colo. 1989) (en banc).[3] Nevertheless, the real question is whether by pleading guilty in the drug case the respondent can be said to have "reopened the dialogue with the authorities" within the meaning of *Edwards*, 451 U.S. at 486 n. 9, 101 S.Ct. at 1885, n. 9, so as to validate his waiver of rights and interrogation on the murder charge.[4] Guilty pleas are accepted in accordance with Rule 11 of the District of Columbia Rules of Criminal Procedure. Nothing in a Rule 11 colloquy would indicate to the

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[3] The petitioner argues that "[t]he 'break in custody' cases are merely specific examples of a broader point: the irrebuttable presumption from *Edwards* should not apply when there is a significant change in the accused status prior to the interrogation." * * * Where the status of the accused has changed dramatically, as it does once he is released from custody or after an adjudication of guilt (whether after a guilty plea or after trial), the assumption that he wishes to have the assistance of counsel in all of his dealings with the police is much less compelling." Pet. Brief 17. This argument ignores the fact that the person who has pleaded guilty to an offense is now much more vulnerable to the authorities. A person having pleaded guilty and who is now awaiting sentencing is as much dependent on his attorney then he was prior to his plea. He is dependent on his attorney to argue for the lightest sentence possible and otherwise assist him at sentencing.

[4] "Guilty pleas have been carefully scrutinized to determine whether the accused knew and understood all the rights to which he would be entitled *at trial*, and that he had intentionally chosen to forgo them. *Schneckloth v. Bustamonte* 412 U.S. 238, 93 S.Ct. 2041 (1973) (emphasis supplied).

respondent that he is waiving his Fifth Amendment privilege except in the context of that case.[5] Clearly the entry of the guilty plea with his attorney present is consistent

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[5] Rule 11(c) of the District of Columbia Rules of Criminal Procedure states.

> (c) *Advice to defendant.* Before accepting a plea of guilty or nolo contendere, the Court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:
>
> (1) The nature of the charge to which the plea is offered, the mandatory minimum penalty provided by the law and, when applicable, that the Court may also order the defendant to make restitution to any victim of the offense; and
>
> (2) If the defendant is not represented by an attorney, that the defendant has the right to be represented by an attorney at every stage of the proceedings and, if necessary, one will be appointed to represent the defendant; and
>
> (3) That the defendant has the right to plead not guilty or to persist in that plea if it has already been made, the right to be tried by a jury and at that trial the right to the assistance of counsel, the right to confront and cross examine adverse witnesses, and the right against compelled self-incrimination; and
>
> (4) That if a plea of guilty or nolo contendere is accepted by the Court there will not be a further trial of any kind, so that by pleading guilty or nolo contendere the defendant waives the right to a trial; and
>
> (5) If the Court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which the defendant has pleaded, that the defendant's answers may later be used against the defendant in a prosecution for perjury or false statement.

with his original desire to deal with the government through his attorney.

b. The second factor that the petitioner feels distinguishes that case from previous *Edwards* decisions is the five month interval between the respondent's invocation of his request for counsel and the subsequent interrogation. Admittedly *Edwards* is "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights," *Minnick*, 111 S.Ct. at 489, and that that danger is reduced when the police have made no effort to interrogate the defendant for more than five months after his assertion of rights. In *Minnick*, although the relevant interval was only a matter of days, the Court emphasized "the coercive pressures that accompany custody and that may increase as custody is prolonged." 111 S.Ct at 491. As the Court of Appeals correctly noted:

> * * * Moreover, except for his ongoing contacts with his custodial caretakers, we must assume that [respondent]'s only contact with law enforcement officials (investigators and prosecutors) during this period was through, or in the presence of, his attorney. Hence, there is nothing in the lapse of time itself from which to deduce that his original belief in his vulnerability to the pressures of custodial interrogation had diminished as he progressed through the steps of pleading guilty to the (lesser included) offense of attempted drug distribution; it is just as likely that his sense of dependence on, and trust in, counsel as the guardian of his interests in dealing with government officials intensified.

Res. App. 10a.

As previously stated (Note 3, supra) having pleaded guilty the respondent is now more vulnerable to the authorities. He is placed in the position where, while awaiting sentencing, his actions can control the sentence the judge imposes. A negative report from the Pre-sentence report writer, the government or his custodians could well result in a longer sentence or the difference between a probationary sentence or incarceration. At the motions hearing the respondent testified that his daily routine included "go[ing] to my programs as in schooling and go to see my C and P officer as – to see if I am going to be recommended the Youth Act or recommended for probation." Res. App. C-56.[6]

Additionally, the prolonged incarceration of the respondent leads to an additional problem. As custody is prolonged the respondent becomes institutionalized by the incarceration. The respondent is told when to get up, when to sleep, when to eat, when to bathe. All his movements are controlled by the prison officials. In this atmosphere the person would feel compelled to continue to abide by the instructions of those in authority.

Finally, the petitioner's argument that the lapse of time distinguishes this case would eliminate the "bright-line rule" that the Court has created and this Court has

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[6] Compare this situation to the "cruel trilemma of self-accusation, perjury or contempt," that this Court said faced the suspect in *Pennsylvania v. Muniz*, 110 S.Ct. 2638 (1990). Muniz was stopped for drunk driving and was asked to answer questions regarding the date of his sixth birthday which he could not remember. This Court found that the answer to that question was testimonial in nature and that since he had not been advised of his *Miranda* rights it was inadmissible.

"repeatedly emphasized the virtues of a bright-line rule in cases following *Edwards* as well as *Miranda*. *Arizona v. Roberson*, 108 S.Ct. 2098 and that the Court "like[s] them to be 'clear and unequivocal,' " *McNeil v. Wisconsin*, 111 S.Ct 2204 (1991).[7]

c. Finally, the petitioner argues that this case differs from the Court's earlier *Edwards* rulings because respondent was approached by the police concerning the murder only after his previous request for counsel in connection with the drug offense had been honored. Respondent was provided with counsel and had consulted with his lawyer months before the police sought to question him about the murder, which was wholly unrelated to the drug charge that had prompted his invocation of the *Edwards* right. The distinction relied upon is that in *Arizona v. Roberson* the police reinitiated interrogation without honoring the suspect's request for counsel and in *Minnick v. Mississippi* the renewed interrogation concerned the same offense that had prompted the suspect's invocation of the right to counsel. *Minnick* and *Roberson* read together must control this case. This distinction that the petitioner relies upon was addressed by the Court of Appeals.

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[7] In their brief as *Amicus Curiae*, the District of Columbia proposes that in situations where the suspect has asserted his right to counsel and a sufficient period of time has elapsed since the assertion of the right that the police be permitted to interrogate the suspect on a different offense after fully advising him of his *Miranda* rights. The validity of the waiver would be determined on the totality of the circumstances. This proposal would eliminate, entirely, the "bright-line rule" in those situations involving questioning on two separate offenses.

> But if *Edwards, Roberson* and *Minnick* together teach anything, it is the need for great caution in finding distinctions among cases all involving the paradigmatic original request by the accused for counsel, reflecting "his own view that he is not competent to deal with authorities without legal advice,": *Roberson,* 486 U.S. at 6811, 108 S.Ct. at 2098 (citation omitted). The Supreme Court having made clear that police initiated "Questioning about a separate offense and questioning after opportunity to consult counsel each fails to justify departure from *Edwards'* " bright-line, prophylactic * * * *id.* at 682, 108 S.Ct. at 2098, we are not convinced that in combination the Court would regard these two factors differently.

Res. App. A 8a.

2. Nothing in the facts of this case significantly distinguish it from *Edwards, Roberson,* or *Minnick.* In those cases the Court has established a "bright-line rule" to clearly and unequivocally tell police officers that after a suspect has stated that he is unwilling to talk to the police without an attorney present that questioning must cease until an attorney is present. The rule recognizes the importance that an attorney plays in the adversarial process and the dangers inherent in custodial interrogation. The costs associated with this rule are minor. If this case extends *Edwards* at all it would only be in the situation where a suspect has indicated his desire to deal with the police only through counsel and the suspect has been in continuous custody since announcing that desire. On the other hand it maintains the clarity of the Court's "bright-line rule."

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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